

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAXINE CONRAD f/k/a MAXINE EMERSON

Claimant

VS.

USD 250

Respondent

AND

KANSAS ASSOCIATION OF SCHOOL BOARDS

Insurance Fund

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Docket No. 1,022,891

ORDER

Respondent and its insurance fund appealed the March 30, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant injured her right knee on February 13, 2003, while working for respondent. The parties stipulated claimant's injury arose out of and in the course of her employment with respondent. In the March 30, 2006, Award, Judge Hursh determined the functional impairment rating provided by Dr. Edward J. Prostic was more persuasive than the rating provided by Dr. Michael P. Zafuta. Consequently, the Judge awarded claimant permanent disability benefits under K.S.A. 44-510d for a 20 percent disability to the leg. In addition, the Judge ordered respondent and its insurance fund to provide claimant with anti-inflammatory medications.

Respondent and its insurance fund contend Judge Hursh erred by adopting Dr. Prostic's functional impairment rating. They argue Dr. Prostic did not adequately account for preexisting degenerative changes in claimant's knee, he did not use the AMA *Guides*¹ in an appropriate manner, and he is biased. Accordingly, they request the Board to modify the Award and adopt the four percent impairment rating to the leg provided by Dr. Zafuta.

Conversely, claimant contends the Award should be affirmed. Claimant argues Dr. Zafuta could not explain how he determined claimant's functional impairment under the required *Guides* and, therefore, the Judge properly relied upon Dr. Prostic's rating.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability. In their application for Board review, respondent and its insurance fund questioned claimant's need for future medical treatment. But that issue was not raised in their brief filed with this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the entire record and the parties' briefs, the Board concludes the Award should be affirmed.

The respondent school district employed claimant as a paraprofessional to work with special needs children. There is no dispute that on February 13, 2003, claimant injured her right knee when she landed on her right knee while attempting to lift a paraplegic child into a wheelchair.

Claimant experienced immediate pain in her knee and sought medical treatment. An MRI indicated claimant had a torn medial meniscus and chondromalacia of the patella. Claimant came under the medical care of board-certified orthopedic surgeon Dr. Michael P. Zafuta, who in early August 2003 operated on claimant's knee. Despite the surgery and therapy, claimant continued to experience knee pain. Consequently, the doctor prescribed two rounds of Synvisc injections.

Despite all the medical treatment and therapy claimant has received, her right knee remains in constant pain for which she takes an anti-inflammatory. Before this accident claimant never experienced any right knee problems.

The parties agreed claimant would be entitled to receive permanent disability benefits under the schedule of K.S.A. 44-510d.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Respondent and its insurance fund presented Dr. Zafuta's testimony. While operating on claimant's knee to remove the torn part of claimant's meniscus, the doctor noted an area in which claimant had a complete loss of articular cartilage on the femoral condyle. Surrounding that area of exposed bone, the doctor noted claimant had cartilage tearing that extended to the bone. Likewise, the doctor found unstable chondral flaps and early cartilage wear and tear at the medial tibia.

In short, Dr. Zafuta concluded claimant had degenerative joint disease in her knee that was aggravated by her work injury. The doctor rated claimant's injuries as comprising a four percent impairment to the knee. But the doctor was unable to explain how he arrived at that rating. The doctor explained:

Q. (Ms. Marietta) Turning to your assessment under the Guides, the 4-percent rating, could you tell me how you came to that conclusion.

A. (Dr. Zafuta) Admittedly, I did a poor job of documenting, so I'm not sure how I did that.

Well, I'm sure part of it would be from page 3/85, table 64, the meniscectomy rating. But there's others. I'm not certain of where.²

. . . .

Yeah. I'm uncertain of where I came up with exactly 4 percent because I must have used something else as well. Because medial or lateral partial would be a whole person impairment of 1 percent, lower extremity impairment of 2 percent.³

. . . .

Q. Take your time. I just wanted to see what process that you went through to come up with that rating and what factors led to your conclusion.

A. I don't know where the exact 4 came from. I can't recall. I don't know.⁴

Judge Hursh was not persuaded by Dr. Zafuta's testimony. On page 3 of the March 30, 2006, Award, the Judge found:

² Zafuta Depo. at 24.

³ *Id.* at 25.

⁴ *Id.* at 26.

In this case, two doctors testified about the claimant's permanent impairment resulting from the work injury. Dr. Zafuta said the claimant has a 4% impairment to the knee, but he was not sure how he derived that rating from the *Guides*. At first, he said it was for the claimant undergoing a meniscectomy, but then it was pointed out that according to the *Guides* meniscectomy, by itself, only produces a 2% impairment. Dr. Zafuta then "imagined" that his rating came from 2% for the meniscectomy, and 2% for two degrees of flexion contracture, although that amount of flexion contracture did not amount to 2% impairment under the *Guides*. Dr. Zafuta's opinion of permanent impairment was not persuasive.

Claimant hired board-certified orthopedic surgeon Dr. Edward J. Prostic to evaluate claimant for purposes of this claim. Dr. Prostic examined claimant on May 24, 2005, and the doctor concluded claimant sustained a torn medial meniscus and injured the articular cartilage of her right knee due to her February 2003 accident at work. Using the *AMA Guides* (4th ed.), Dr. Prostic concluded claimant's knee injury comprised a 20 percent functional impairment to the leg.

Regarding future medical care, Dr. Prostic concluded claimant should continue to take anti-inflammatories and that she may require additional physical therapy or injections. Moreover, the doctor believed claimant may require a total knee replacement before very long.

The Board agrees with Judge Hursh's analysis and likewise adopts Dr. Prostic's opinions regarding claimant's functional impairment. Accordingly, the March 30, 2006, Award should be affirmed.

The Board adopts the Award's findings and conclusions that are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the March 30, 2006, Award.

The record does not contain a fee agreement between claimant and her attorney. K.S.A. 44-536 requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Judge for approval.

IT IS SO ORDERED.

**MAXINE CONRAD
f/k/a MAXINE EMERSON**

DOCKET NO. 1,022,891

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Fund